No. 10443

United States
Circuit Court of Appeals
For the Ninth Circuit

W. S. SWANK,

Appellant,

v.

J. H. PATTERSON, E. J. GOTTHELF, CHARLES S. SMITH, CHARLES C. BRADBURY, and WILLIAM G SCHULTZ,

Appellees.

Upon Appeal from the District Court of the United States for the District of Arizona

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BRIEF FOR THE APPELLANT

C. H. RICHESON
Phoenix, Arizona
Attorney for Appellant.

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OPINION BELOW

The memorandum of order denying appellant's corrected application to set order aside extending time to answer and motion for default page 26 of the Record, and the order dismissing case for the reason that the complaint does not state a cause of action is on page 48 of the Record. Also, order denying application to remove Cecil A. Edwards as counsel for appellees page 28 of the Record.

JURISDICTION

The amended complaint filed March 20, 1943, as well as the original complaint filed December 26, 1942, is for the recovery of damages to appellant because appellees conspired to perfect and put in operation a monopoly in violation of Section 2, Title 15, of the Laws of the United States, to deny appellant his constitutional rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

Whether the default should be had on appellant's corrected application to set order aside extending time to answer and motion for default.

Whether the American Medical Association and its subsidiaries can set the standard of qualifications for the practice of medicine.

Whether Cecil A. Edwards, as Assistant Attorney General of the State of Arizona, can represent appellees in this action.

STATUTES AND REGULATIONS INVOLVED

All of Article 9, Laws of Arizona, 1928:

Article 9. Medicine and Surgery.

S. 2554. Board of Medical Examiners; appointment; terms; meetings; salary. The governor shall appoint a Board of Medical Examiners consisting of

five members, each of whom shall have resided in Arizona for a period of three years next before his appointment, and be a licensed graduate practioner. Two members shall be from the allopathic, one from the homeopathic, one from the eclectic and one from the osteopathic schools of medicine. Vacancies occurring in the representation of said professions respectively, shall be filled from said profession. The appointment of each member shall be for a term of two years. No professor, instructor, or other person in any manner connected with, or financially interested in, any college or school of medicine, surgery or osteopathy shall be appointed. Said board shall elect from its number a president, vice president, second vice president, secretary and treasurer, who shall hold their respective positions during the pleasure of said board. Regular meetings shall be held at its office at the state capitol on the first Tuesday of January, April, July and October of each year. Said board may adopt rules and any member may administer oaths and take evidence in any matter cognizable by the board. The board shall fix the salary of the secretary not to exceed twelve hundred dollars per year and the compensation of the other members, not to exceed ten dollars for each day of actual service, and the members of the board shall receive their actual expenses when on the business of the board. (S S 1-2-3-4-5. 13 Ch. 17, L'13 and S.S.; 4733- 4-5-6-7, 4745, R.S. '13; 4734, Am. 73, Ch. 35, L. '22 cons. & rev.) S. 2555. Practice of medicine defined. A person shall be regarded as practicing medicine who shall, by any indication, or statement, claim his ability or willingness, to or does diagnosti-

cate, or prognosticate, any human ills, or claims his ability or willingness to, or does prescribe or administer any medicine, treatment or practice; or performs any operation, or manipulation, or application for compensation therefor, except it be in usual practice of dentistry, midwifery, or pharmacy, or in the usual business of opticians, or of vendors of dental or surgical instrument, apparatus or appliances. Practicing medicine shall include this practice of osteopathy. (S. 6, id.: 4738, R.S. '13 rev.) S. 2566. Certificates to practice; requirements of applicants; examination; reciprocity certificates; fees. Three forms of certificates shall be issued by said board, under the seal thereof and signed by the president and secretary; first a certificate authorizing the holder thereof to practice medicine and surgery; second, authorizing the practice of osteopathy; third, a reciprocity certificate. Any of these certificates on being recorded in the office of the county recorder, shall constitute the holder thereof a duly licensed practitioner in accordance with the provisions of his certificate. To procure a certificate to practice medicine and surgery, the applicant shall file with said board, at least two weeks prior to a regular meeting thereof, satisfactory testimonials of good moral character, and a diploma issued by some legally chartered school of medicine, the requirements of which shall have been, at the time of granting such diploma, not less than those prescribed by the Association of American Medical Colleges for that year, or satisfactory evidence of having possessed such diploma; and he must also file a verified application, upon blanks furnished by the board,

stating that he is the lawful holder thereof and that the same was procured without fraud or misrepresentation.

Applicants for a certificate to practice osteopathy shall be subject to the same regulations, except that instead of the diploma from a school of medicine, they shall file a diploma, from a legally chartered college of osteopathy, having a course of instruction of at least twenty months, requiring actual attendance of three years of nine months each, including the studies examined upon for his license. Applicants for a certificate to practice any other system or mode of treatment shall be subject to the above regulations, except that instead of the diploma referred to, they shall file a diploma from a legally chartered college of the system or mode of treatment which the applicant claims or intends to follow.

The examination shall be conducted in the English language, shall be practical in character and in whole or in part, in writing, on the following subjects: Anatomy, histology, gynocology, pathology, bacteriology, chemistry and toxicology, physiology, obstetrics, general diagnosis, hygene. Examination in each subject shall consist of not less than ten questions, answers to which shall be marked upon a scale of zero to ten. An applicant must obtain not less than a general average of seventy-five per cent, and not less than sixty per cent in any one subject; provided, that applicant who can show five years of reputable practice shall be granted a credit of five per cent upon

the general average, and five per cent additional for each subsequent ten years of such practice, but must receive not less than fifty per cent upon any one subject. The examination papers shall form part of the records of the board and shall be kept on file by the secretary for one year after such examination. In the examinations the applicants shall be known and designated by numbers only, and the names attached to the numbers shall be kept secret until after the board has finally passed upon the applications. The Secretary of the board shall not participate as an examiner in the examination.

Any applicant for a certificate to practice medicine and surgery shall be granted a reciprocity certificate without such examination, if he shall file with said board the testimonials, diploma, and application, and shall file a certificate or license to practice medicine or surgery issued upon and after examination to said applicant by any state or foreign country where the requirements are at least equal to those in force in Arizona at that time, or by the national board of medical examiners, and which certificate shall be accompanied by a further certificate, issued by the medical officer or board issuing the certificate or license first named, or by a certificate issued by the medical officer or board of the jurisdiction wherein the applicant last practiced, that the applicant at the time of the issuance of said last named certificate was an ethical practitioner and has practiced medicine and surgery for at least three years immediately prior to the issuance of said certificate; an applicant for a

reciprocity certificate or license, who shall otherwise comply with the provision hereof, and who shall file with said board evidence of an honorable discharge from the medical corps of the army or navy of the United States, shall not be required to furnish character testimonials or file the certificate of ethical practice for said three years. The fee for reciprocity certificates shall be one hundred dollars, if the credentials are held insufficient, seventy-five dollars shall be returned.

The board may, whenever the services of an applicant are needed as an emergency in any community, grant to a graduate of any recognized medical college, a temporary permit to practice medicine and surgery in said community, such temporary permit to be valid only until the next regular meeting of the board. The fee for such temporary permit shall betwenty-five dollars. (S. 7, id.; 4739, R.S. '13 am., Ch. 66 L '17, Ch. 119, L' '21 rev.)

* * *

Sections 67-1101 to 671114, Revised Code of Arizona, 1939:

67-1101 Board of Medical Examiners—Appointment—Terms—Meetings—Salary. The governor shall appoint a board of medical examiners consisting of five (5) members, each of whom shall have resided in Arizona for a period of three (3) years next before his appointment, and be a licensed graduate practitioner. Four (4) members shall be graduates of

schools recognized by the American Association of Medical Colleges, and one (1) shall be a graduate of a recognized school of osteopathy. Vacancies occurring in the representation of said profession respectively, shall be filled from said profession. The first appointee shall serve for two (2) years, the second for three (3) years and the third for four (4) years, the fourth for five (5) years and the fifth for six (6 years. Thereafter each member appointed shall be for a term of six (6) years. No professor, instructor or other person in any manner, with, or financially interested in, any college or school of medicine surgery or osteopathy shall be appointed.

The board shall elect from among its members a president, vice-president, second vice-president, secretary and treasurer, who shall hold their respective positions during the pleasure of the board. Regular meetings shall be held at the office of the board at the state capitol on the first Tuesday of January, April, July and October of each year. The board may adopt rules and any member may administer oaths and take evidence in any matter cognizable by the board, The board shall fix the salary of the secretary, not to exceed twelve hundred ($1200.00 dollars per year, and the compensation of the other members not to exceed ten dollars ($10.00) for each day of actual service, and the members of the board shall receive their actual expenses when on the business of the board. (R.S. 1913, S S 4733-4737, 4745; Laws 1922, Ch. 35, S S 73, p. 174, cons. & rev. RC 1928, SS 2554; Laws 1935, Ch. 99, ss 1. p. 409.)

67-1102 Practice of medicine defined. A person shall be regarded as practicing medicine who shall, by any indication, or statement, claim his ability or willingness to, or does diagnosticate or prognosticate, any human ills, or claims his ability or willingness to, or does prescribe or administer any medicine, treatment or practice, or performs any operation, or manipulation, or appplication for compensation therefor, except it be in usual business of opticians, or of vendors of dental or surgical instruments, apparatus and appliances. Practicing medicine shall include the practice of osteopathy. R.S. 1913, ss 4783; Rev. R. C. 1928, ss 2555.)

67-1103. Certificate to practice—Requirements of applicants—Examination—Reciprocity certificates—Fees. Three (3) forms of certificates shall be issued by said board, under the seal thereof and signed by the president and secretary; first, a certificate authorizing the holder thereof to practice medicine and surgery; second, authorizing the practice of osteopathy; third, a reciprocity certificate. Any of these certificates, on being recorded in the office of the county recorder, shall constitute the holder thereof a duly licensed practitioner in accordance with the provisions of his certificate. To procure a certificate to practice medicine and surgery, the applicant shall file with said board, at least two (2) weeks prior to a regular meeting thereof, satisfactory testimonials of good moral character, and a diploma issued by some legally chartered school of medicine, the requirements of which shall have been, at the time of granting such

diploma, not less than those prescribed by the Association of American Medical College for that year, or satisfactory evidence of having possessed such diploma, and he must also file a verified application, upon blanks furnished by the board, stating that he is the person named in such diploma, that he is the lawful holder thereof, and that the same was procured in the regular course of instruction and examination without fraud or misrepresentation.

Applicants for a certificate to practice osteopathy shall be subject to the same regulations, except that instead of the diploma from a school of medicine, they shall file a diploma from a legally chartered college of osteopathy, having a course of instruction of at least twenty (20) months, requiring actual attendance of three (3) years of nine (9) months each, and including the studies examined upon for his license. Applicants for a certificate to practice any other system or mode of treatment shall be subject to the above regulations, except that instead of the diplomas referred to, they shall file a diploma from a legally chartered college of the system or mode of treatment which the applicant claims or intends to follow.

The examination shall be conducted in the English language, shall be practical in character and in whole or in part, in writing, on the following subjects: Anatomy, histology, gynecology, pathology, bacteriology, chemistry and toxicology, physiology, obstetrics, general diagnosis, hygiene. Examination in each subject, shall consist of not less than ten (10 questions,

answers to which shall be marked upon a scale of zero to ten. Applicant must obtain not less than a general average of seventy-five (75) per cent, and not less than sixty (60) per cent in any one (1) subject; provided that applicants who can show five (5) years of reputable practice shall be granted a credit of five (5) per cent upon the general average, and five (5) per cent additional for each subsequent ten (10 years of such practice, but must receive not less than fifty (50) per cent upon any one (1) subject. The examination papers shall form a part of the records of the board and shall be kept on file by the secretary for one (1) year after such examination. In the examinations the applicants shall be known and designated by number only, and the names attached to the numbers shall be kept secret until after the board has finally passed upon the applications. The secretary of the board shall not participate as an examiner in the examination.

Any applicant for a certificate to practice medicine and surgery shall be granted a reciprocity certificate without such examination if he shall file with said board the testimonials, diploma, and application; and shall file a certificate or license to practice medicine or surgery issued upon and after examination to said applicant by any other state or foreign country where the requirements are at least equal to those in force in Arizona, at that time, or by the national board of medical examiners, and which certificate shall be accompanied by a further certificate, issued by the medical officer or board issuing the certificate or license

first named, or by a certificate issued by the medical officer or board of the jurisdiction wherein the applicant last practiced, that the applicant at the time of the issuance of said last namer certificate was an ehtical practioner and has practiced medicine and surgery for at least three (3) years immediate prior to the issuance of said certificate; an applicant for a reciprocity certificate or license who shall otherwise comply with the provisions hereof, and who shall file with said board evidence of an honorable discharge from the medical corps of the army or navy of the United States, shall not be required to furnish charecter testimonial or file the certificate of ethical practice for said three (3) years. The fee for reciprocity certificates shall be one hundred dollars ($100.00), if the credentials are held insufficient seventy-five dollars ($75.00) shall be returned.

The board may, whenever the services of an applicant are needed as an emergency in any community, grant to a graduate of any recognized medical college, a temporary permit to be valid only until the next regular meeting of the board. The fee for such temporary permit shall be twenty-five dollars ($25.00). (R.S. 1913 ss 4739; Laws 1917, Ch. 66 ss 1, p. 98; L 1921, Ch. 119, ss 1 p. 264. Rev. R.C. 1928 ss 2556.)

67-1104. Fee—Records. Each applicant, on making application shall pay a fee of twen-five ($25.00) dollars, fifteen ($15.00) of which shall be returned if the applicant's credentials are insufficient, or he does

not desire to take the examination. The board shall keep a record of all of its proceedings, a register of all applicants and the result of each examination. (R.S. 1913, ss 4740, 4741; Cons. & Rev. R.C. 1928 ss 2557.)

* * *

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Article III of the Constitution of the United States, in part:

ARTICLE III. Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish.

Section 2, Title 15, Laws of the United States:

S. 2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, S 2, 26 Stat. 209.

* * *

Subdivision 1, Section 4-502, Laws of Arizona 1939:

S. 4-502. Duties.—The attorney-general shall:

1. Devote his entire time to the discharge of the duties of his office and not engage directly or indirectly in the private practice of law;

* * *

Rule 9, Rules of Practice of the United States District Court for the District of Arizona:

RULE 9—LAW AND MOTION CALENDAR; STATEMENT OF POINTS AND AUTHORITIES.

With every pleading or motion raising questions of

law to be determined by the court, there shall be served and filed by the party urging the same, a brief or memorandum of the points and authorities in support of the issues raised in such pleading or motion, and failure to file such memorandum shall be deemed a waiver of such pleading or motion. The opposing party or parties shall have 5 days after such service within which to serve and file a vrief or memorandum of points and authorities in opposition to such pleading or motion. Pleadings and motions raising questions of law to be determined by the court, other than at the traial, will be submitted without oral argument on the memoranda of points and authorities required to be filed by this rule, provided, however, any party desiring to be heard on any such pleading or motion may serve and file with his pleading or motion or with his memorandum of points and authorities, a notice of hearing, and the pleading or motion shall thereupon be placed on the law and motion calendar for hearing on the first law and motion day occurring after the expiration of 5 days after the time to file briefs or memorandum of points and authorities with respect to said pleading or motion has expired. A failure to file a brief or memorandum of points and authorities in oppostion to any pleading or motion raising questions of law shall constitute a consent of the party failing to file such brief or memorandum to the sustaining of said pleading or granting of said motion. Should the court desire oral argument on any pleading or motion submitted, the clerk will place the same on the law and motion calendar and notify respective parties or counsel accordingly.

Unless otherwise ordered by the court, or provided in these rules, every Monday shall be law and motion day, on which will be heard ex parte motions and all pleadings or motions raising questions of law or fact to be determined by the court before trial or after verdict. Parties filing motions on which hearings are to be had shall notice the same for hearing on a law and motion day and all motions noticed for hearing on any other day are hereby continued to the first law and motion day following the day fixed in the notice of hearing unless otherwise ordered by the court. Such motions or pleadings in cases filed in the Tucson or Globe Divisions of the court will be heard at Tucson; such motions or pleadings in cases filed in the Phoenix or Prescott Division of the court will be heard at Phoenix, provided, when court is in session at Globe or Prescott on law and motion day, such motions or pleadings in cases filed in the Globe or Prescott Divisions will be heard at Globe in cases filed in the Globe Division and will be heard at Prescott in cases filed in the Prescott Division; and provided further, when the convenience of the court or counsel may require, the Court may hear and determine any such motion or pleading at any of the four places designated for holding the terms of this court.

* * *

Rule 6 of the Rules of United States District Courts:

Rule 6. Time.

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.

(c) Unaffectedby Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by

the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(d) For Motions—Affidavtits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supportedby affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59 (c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

STATEMENT

The court below made only the following findings:

That the motion for default should not b granted, and denied the application to remove Cecil A. Edwards, Assistant Attorney General, representing the appellees, and dismissed the action for the reason that

the second amended complaint did not state a cause of action (R. 23 and 48).

This is an action by appellant for damages against appellees for denyying him the right to be examined for a license to practice medicine and in so doing conspiring to violate Section 2, Title 15, of the Laws of the United States, thereby denying the rights guaranteed to appellant under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Appellees are members of the American Medical Association. Morris Fishbein, the Secretary of the American Medical Association, before a subcommittee of the Committee on Education and Labor of the United States Senate, Seventy-seventh Congress, on Senate Resolution 291, testified as follows:

> Senator PEPPER. Where do you live, Doctor?
> Dr. FISHBEIN. Chicago.
>
> Senator PEPPER. Where did you receive your medical education?
>
> Dr. FISHBEIN. The University of Chicago and the Rush Medical Clolege, Chicago.
>
> Senator PEPPER. How long have you been engaged in the practice of medicine?
>
> Dr. FISHBEIN. Following my graduation I was about a year and a half in practice and in pathologic research.

Senator PEPPER. And where was that carried on, largely?

Dr. FISHBEIN. In Chicago.

Senator PEPPER. You have been in active practice only about 1½ years since your graduation?

Dr. FISHBEIN. Yes, sir.

Senator PEPPER. That covers what period, Doctor?

Dr. FISHBEIN. From 1912 to toward the end of 1913.

Senator PEPPER. You are not now engaged in the practice of medicine?

Dr. FISHBEIN. No, sir.

Senator PEPPER. What is your employment at the present time?

Dr. FISHBEIN. I am editor of the Journal of the American Medica Association, and of Hygeia, a health magazine. I also am professorial lecturer of medicine at the University of Chicago School of Medicine, and the University of Illinois.

Senator PEPPER. What are the subjects of your lectures?

Dr. FISHBEIN. Medical economics and history of medicine.

Senator PEPPER. They are not technical subjects?

Dr. FISHBEIN. Not practical medicine.

Senator PEPPER. How long have you held your present postion?

Dr. FISHBEIN. I have been editor since 1924, and assistant editor from the end of 1913 up to 1924.

Senator PEPPER. In what manner were you chosen for your present position?

Dr. FISHBEIN. I was chosen by the board of trustees of the American Medical Association, which is the body elected by the house of delegates to administer its affairs.

Senator PEPPER. Will you give us a brief summary as to the nature of the organization known as the American Medical Association, the number who are in it, and what its organizational setup is, Doctor?

Dr. FISHBEIN. The American Medical Asbership organization. There are in theetaoinisociation is a voluntary organization, voluntary membership organization. There are in the

United States about 176,000 doctors licensed to practiced. There are 123,000, approximately, who are members of the American Medical Association.

These members are organized into county medical societies, which in turn are organized into State medical societies. The county medical societies elect delegates to the State medical associations and the house of delegates of each of the State associations elects delegates to the house of delegates of the American Medical Association. The house of delegates of the American Medical Association is the body charged with establishing

all policies of the American Medical Association.

Senator PEPPER. Do you have annual conventions?

Dr. FISHBEIN. There is an annual convention of the house of delegates and of the organization, and in addition to that, special meetings when called for.

Senator PEPPER. That annual convention embraces which house of delegates, the national house?

Dr. FISHBEIN. The national house of delegates.

Senator PEPPER. The one that is elected by the States?

Dr. FISHBEIN. By the State house of delegates.

Senator PEPPER. And the national house of delegates selects a board of trustees?

Dr. FISHBEIN. The national house of delegates selects a board of trustees.

Senator PEPPER. How many are there on that board?

Dr. FISHBEIN. There are nine members of the board of trustees. Two are elected each year to serve a term of 5 years, and the maximum term is 10 years for any trustee.

Senator PEPPER. You are employed, then, by the board of trustees?

Dr. FISHBEIN. I am employed by the board of trustees.

Senator PEPPER. Do you have a national headquarters of the association?

Dr. FISHBEIN. The national headquarters is in Chicago.

Senator PEPPER. How much of a clerical and managerial staff is employed?

Dr. FISHBEIN. We employ from 630 to 640 people.

Senator PEPPER. Are you considered the executive director of the organizational set-up of the association?

Dr. FISHBEIN. No, sir; the association is organized with a secretary and general manager, who is the executive director. That is Dr. West. I am the editor in charge of publications.

Senator PEPPER. Who determines the public policy for the assocation?

Dr. FISHBEIN. The house of delegates determines all policies, and the officials of the association are charged with maintaining and extending to the professional the policies of the association.

Senator PEPPER. Do you sit in with the group which determines the policies of the association?

Dr. FISHBEIN. I have no voice in the house of delegates except when called to give information.

Senator PEPPER. As a practical matter, do you consult with the members of this body in the formation of policies?

Dr. FISHBEIN. I may appear before any committee. All actions of the house of delegates are taken by setting up a reference commitee

which hears the proposed action, and any member of the association may appear before any reference commitee. The reference committee brings back its report to the house and then the house acts on the report of the reference committee, after debate.

Senator PEPPER. As a practical day-by-day matter, the articulation of the policy occurs primarily in the publication known as the Journal of the American Medical Association?

Dr. FISHBEIN. Yes.

Senator PEPPER. Of which you are editor?

Dr. FISHBEIN. Yes, sir.

Senator PEPPER. So that you are the one who articulates these policies that are formed, you say, by these authorities?

Dr. FISHBEIN. Of course, the proceedings of the House of Delegates are published, broadcast, to the medical professiona and the Nation as soon as an action is taken; the articulation of the policy is in the proceedings of the house of delegates which are published as a routine matter without modification.

Senator PEPPER. How many times are those publications issued; how many times is the action of the house of delegates published?

Dr. FISHBEIN. It is published at once when the action is taken, and then maybe it is published repeatedly if discussion is neede.

Senator PEPPER. How many times per year is the Journal of the American Medical Association published?

Dr. FISHBEIN. Every week.

Senator PEPPER. So the public gets a chance to see and hear the articulation of the Journal of the American Medical Association a great deal than they hear what is uttered by the body which you refer to, does it not?

Dr. FISHBEIN. That depends, of course, on the importance of the policy in relationship to the public situation.

At the last annual convention of the association in Atlantic City there were in attendance representatives of every press association and important newspaper in the country, so that the actions were widespread through the Nation.

Senator PEPPER. But the only weekly publication, the only regular periodical of the American Medical Association, is the Journal of which you are the editor?

Dr. FISHBEIN. No; there is also another publication which is sent to all newspapers and press

agencies throughout the country each week.

Senator PEPPER. What is that?

Dr. FISHBEIN. That is known as the American Medical Association News. So that all matters having to do with activities are sent uot each week.

Senator PEPPER. Who is the editor of that?

Dr. FISHBEIN. A layman named Lawrence Salter.

Senator PEPPER. Is his office in the headquarters of the association in Chicago?

Dr. FISHBEIN. Yes.

Senator PEPPER. Is there any practical cooperation between you and him?

Dr. FISHBEIN. He prepares the publication, and naturally it is O. K.'d by the editor and the general manager.

Senator PEPPER. Which means you?

Dr. FISHBEIN. And Dr. West.

Senator PEPPER. So, as a matter of fact you are considered are you not, Doctor, the able and eloquent voice of the American Medical Association?

Dr. FISHBEIN. Well, that is not my term.

Senator PEPPER. Maybe I should have said the pen instead of the voice?

Dr. FISHBEIN. I prefer to be known as the tditor of the Journal of the American Medical Association.

Senator PEPPER. Ofttimes we cannot limt ourselves below the reputation that we have gained, Doctor. As a matter of fact, do you make any public addresses?

Dr. FISHBEIN. Many.

Senator PEPPER. Roughly, how many speeches do you make in the course of a year, would you say?

Dr. FISHBEIN. About 100.

Senator PEPPER. Does any other official of the American Medical Association make as many addresses?

Dr. FISHBEIN. I would say that many of them make addresses. Dr. Boyer, who is head of our bureau of health education, makes perhaps 60 addresses a year.

Senator PEPPER. He speaks primarily about public health matters, more or less on technical subjects I would assume?

Dr. FISHBEIN. He speaks on public health. Now each of our trustees makes addresses. I would say that on an average each trustee may speak from 10 to 12 times a year.

Senator PEPPER. On matters of American Medical Association policy?

Dr. FISHBEIN. Almost wholly on policy.

Senator PEPPER. But it would not do any disservice to the great contribution that you have made to the medical association would it, Doctor, to say that so far as the American public is concerned, and generally so far as the American Medical Association members are concerned, you are the man, the official, the agency, through which the policies of the American Medical Association are regularly expressed in writing and in speech?

Dr. FISHBEIN. That is correct; yes, sir.

Senator PEPPER: Now, Doctor, would you be good enough to tel lus whether you are acquainted with the Assignment and Procurement Service, or rather the Procurement and Assignment Service which is set up under the War Manpower Commission?

Dr. FISHBEIN. I am acquainted with that service.

Senator PEPPER. Who is the head of that?

Dr. FISHBEIN. Dr. Frank Lahey.

Senator PEPPER. He was at one time president of the American Medical Association, was he not?

Dr. FISHBEIN. Yes, at the time he was appointed head of the Procurement and Assignment Board.

Senator Pepper. He has some assistants?

Dr. FISHBEIN. He has a board, including four other men.

Senator PEPPER. Are they members of the American Medical Association?

Dr. FISHBEIN. There are 123,000 members of the American Medical Association and it may almost be taken for granted that any physician of any repute at all is a member, so that these men are all members except Dr. Camalier who is on that board and is a member of the American Dental Association—C. Willard Camalier.

* * *

The American Medical Association Journal in every issue has a report on medical legislation, showing the activities in legislation for their group. In the early history of medicine in the United States there were three schools: the Allopathic, Homeopathic, and

Eclectic. The American Medical Association, controlled by the allopathic school of medicine, has been able to do away with the homeopathic schools, and there are few eclectic schools left. The American Medical Association have fostered legislation whereby they have been able to successfully legislate for the qualifications to such an extent that for one to be entitled to take an examination he should be a graduate of a school of medicine equal to the standards of the American Association of Medical Colleges, which is fostered by the American Medical Association. Because the American Academy of Medicine and Surgery, of which Dr. Swank, the appellee, is a graduate, is not recognized by the American Association of Medical Colleges, the appellees refused to give him an examination. The American Academy of Medicine and Surgery teaches the destruction certain drugs, such as narcotics.

The appellant, who has been practicing the healing arts as a naturopathic physician, has been able to cure dementia praecox, high blood pressure, and other diseases that he has made a special study of; and these diseases the American Medical Association admit they have no cure for, but because the cure does not come from their school they would rather the public suffer, and refuse to give him an examination as to his knowledge. This in spite of the fact that appellant has offered to give to the medical world the remedy of the diseases mentioned if they would even give him an examination and a license. But because his school does not belong to the trust that the appellees belong

to, they have even refused to give him an examination, and it is this violation of the anti-trust laws that appellant claims has caused his damages.

ARGUMENT

The corrected application to set aside order extending the time to answer, and motion for default, was filed February 2nd, 1943, supported by a brief of authorities as follows:

> The order extending the time to answer is unlawful because, in addition to the facts and law stated in the motion filed herein, Section 4-502 of the Code of Arizona provides as follows:
>
> The duties of the Attorney General shall be to devote his entire time to the discharge of the duties of his office and not directly or indirectly engage in the private practice of law.

The appellees made no legal appearance in this case, which was evidenced by their introduction in the Sixteenth Legislature of the State of Arizona of Senate Bill 61, which would have authorized the Attorney General to appear for the appellees in this case. Senate Bill 61 as introduced was as follows:

State of Arizona
Senate
Sixteenth Legislature
Regular Session

S. B. 61

Introduced by Mr. Walter J. Thalheimer

AN ACT

RELATING TO THE DUTIES OF THE ATTORNEY GENERAL AND AMENDING SECTION 4-503, ARIRZONA CODE OF 1939.

Be It Enacted by the Legislature of the State of Arizona:

Section 1. Section 4-503 of the Arizona Code of 1939 is amended to read:

"4-503. LEGAL ADVISSOR OF DEPARTMENTS. The attorney-general shall be the legal advisor of all department of the state, and shall give such legal service as such departments may require. With the exception of the industrial commission, THE UNEMPLOYMENT COMPENSATION COMMISSION OF ARIZONA AND THE COLORADO COMMISSION OF ARIZONA no official, board, commission, or other agency of the state, other than the attorney-general, shall employ any attorney or make

any expenditure or insure any indebtedness for legal services. The attorney-general may, when the business of the state requires, employ assistants. PROVIDED THAT WHENEVER A STATE OFFICER OR ANY MEMBER OF ANY BOARD OR COMMISSION OF THE STATE IS SUED FOR DAMAGES FOR AN ACT DONE BY SUCH OFFICER OR MEMBER IN CONNECTION WITH THE PERFORMANCE OF THE DUTIES OF HIS OFFICE, THE ATTORNEY-GENERAL MAY REPRESENT SUCH OFFICER OR MEMBER IN ANY SUCH ACTION."

Sec. 2. EMERGENCY. To preserve the public peace, health and safety it is necessary that this act shall become immediately operative. It is therefore declared to be an emergency measure and shall take effect upon its passage in the manner provided by law.

The bill did not pass the Arizona Senate.

* * *

Appellant had a right to have the case tried with-

out any unlawful delay and to have speedy relief as prayed for.

As there had been no legal appearance by the appellees, the application to extend the time for answering was unlawful. The right of the Attorney General or his deputies to practice law privately was decided by the State Supreme Court of Arizona definitely in the case of Conway v. State Consolidated Publishing Company, 112 P. 2d 218. The following additional authorities were cited in the brief furnished the court below in support of this application and motion for default:

> Rule 6 of this Court, Section B, provides as follows:
>
> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law."

The Department of Justice Bulletin on Federal Rules Decision in Blackmer v. Sun Oil Co., U. S. District Court in New Jersey, December 22, 1939, states:

"The time to file answer may be enlarged after expiration of the period originally prescribed only on motion and notice and not by an ex parte order. An order allowing defendant until a specified ate to 'respond' to the complaint does not authorize filing of motions directed to the pleadings.—"

Department of Justice Headnote.
Federal Rules Service, edited by Pike and Fischer, Vol. II, P. 29.

In the case of Kingsbury v. Brown et al., 92 P. 2d 1053, the Court said:

"To vacate a default, it is incumbent on defendant to show that his mistake was one of fact and not of law, and the neglect of a lawyer to familiarize himself with the law governing the practice of the forum within which his case is pending is not excusable."

In this case its is not a mistake on the part of these defendants, but a wilful violation of law. Therefore, the case of Weinberger v. Manning, 123 P. 2d 531 is applicable in this case wherein the court said:

"Courts are generous in relieving litigants of their defaults resulting from inadvertence or excusable neglect, but are not required to act as guardians for persons who are grossly careless as to their own affairs."

In appellant's second amended original complaint, Paragraph VIII thereof, it is alleged as follows:

"Plaintiff further alleges that the Association of American Medical Colleges is fostered by the American Medical Association; that both the American Medical Association and the American Association of Medical Colleges are monopolistic and act accordingly, in violation of Sec. 2, Title 15 of the United States Code Annotated and in violation of Sec. 74-101 of the Laws of the State of Arizona; that both of said sections prohobit monopolies and said provisions providing that the Association of American Medical College shall make and require such qualifications for the practice of medicine are contrary to the Constitution and Laws of the United States and the Constitution and Laws of the State of Arizona."

While the Supreme Court of the State of Arizona has not passed on the constitutionality of the present Basic Science Law, in Buehman et al. v. Bechtel, 114 Pac. 2d 227, they have stated as follows:

"(1) Only the legislature can create the stand-

ard and provide the reasonable limits of the power of admitting and excluding persons from a business, trade or profession. State v. Harris, supra. It may be granted that the legislature has fixed the standard as competency, ability and integrity and that such standard is a sufficient and a proper one for a person desiring to practice photography, yet it is apparent the legislature used language the board might construe as giving it the right to disregard such standard and set up an arbitrary standard of its own. The board might regard too much or too strong competition as 'sufficient reason' for not licensing a person, or the applicant's age, sex, color or religion might disqualify him. We cannot say the standard fixed by the legislature is not a sufficient guide to the board of examiners, or that the board would arbitrarily disregard such standard and refuse a license to one who qualified under the act, but we do call attention to the fact that the board may use its powers to make it very difficult for worthy persons to secure a license to practice photography.

"In connection with the free use of the police power over certain trades and occupations, for the purpose of securing to those engaged therein rights and powers of an exclusive and monopolisic character, we again quote from Harris v. State:

" 'Statutes regulating trades and occupations

by the delegation of governmental power to boards and commissions formed largely of the groups affected, intended primarily to control the personnel of the business, have become so common as to affect progressively and importantly the social and economic life of the State. A large number of laws of that character may be listed which not only regulate but organize into autonomous corporations occupations ranging from the learned professions to the ordinary trades. U. N. C. Law Review, Vol. 17, p. 1.

" 'No independent administrative supervision is provided over these organizations. No report of their activities is made to any responsible branch of the government. No audit is made by the State, except where items may incidentally affect the State Treasury. These matters are left to internal control. The organizations are, so to speak, legislatively launched and put on their own.

" 'The stage of internal protest has been reached. In marginal cases controveries in the courts have arisen as to whether the organization has captured a sufficient quantum of public purpose to operate as an agency of the government, or whether the police power of the State, ostensibly exercised for a public purpose, is not really farmed out to a private group to be used in narrowing the field of competition, or in aid of exploitation by creating remunerative po-

sitions in administration. Roach v. Durham, 204 N. C. 587, 169 S. E. 149; State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A.L.R. 1366. Without the aid of the statute these groups would be mere trade guilds, or voluntary business association; with it they become State agencies, retaining, however, as far as possible, distinctive guild features. An exclusive self-governing status is achieved by the device of securing a majority membership on the administrative boards or commissions, and in aid of this the power of the State is heavily invoked by way of prosecution in the criminal courts of those who are unable to secure the approval of the Board and obtain license to engage in the occupation.

" 'It is this power of exclusion of fellow workers in the same field that gives to the subject its social significance, and invites our most serious consideration of the constitutional guaranties of personal liberty and individual right called to our attention'."

Therefore, the appellees in committing the acts complained of were not acting as constituted officials of the State, which appellant contends prohibits the Attorney General from representing the appellees in this action.

The appellees' attroney, Cecil A. Edwards, as Assistant Attorney General, did not file any authorities opposing the application and motion for default,

but the date same came on to be heard and argued before the trial court, February 8, 1943, Cecil A. Edwards, as Assistant Attorney General, just before argument, in the courtroom handed counsel for appellant the motion to dismiss filed heretin (R. 27), and added thereto the name of T. E. Scarborough as counsel for appellees.

Appellant respectfully submits that in view of Rule 9 of the Rules of Practice of the United States District Court of Arizona, which reads as follows:

> RULE 9—LAW AND MOTION CALENDAR; STATEMENT OF POINTS AND AUTHORITIES.
>
> With every pleading or motion raising questions of law to be determined by the court, there shall be served and filed by the party urging the same, a brief or memorandum of the points and authorities in support of the issues raised in such pleading or motion, and failure to file such memorandum shall be deemed a waiver of such pleading or motion. The opposing party or parties shall have 5 days after such service within which to serve and file a brief or memorandum of points and authorities in oppostion to such pleading or motion. Pleadings and motions raising questions of law to be determined by the court, other than at the trail, will be submitted without oral argument on the memoranda of points and authorities required to be filed by this rule, provided, how-

ever, any party desiring to be heard on any such pleading or motion may serve and file with his pleading or motion or with his memorandum of points and authorities, a notice of hearing, and the pleading or motion shall thereupon be placed on the law and motion calendar for hearing on the first law and motion day occurring after the expiration of 5 days after the time to file briefs or memorandum of points and authorities with respect to said pleading or motion has expired. A failure to file a brief or memorandum of points and authorities in opposition to any pleading or motion raising questions of law shall constitute a consent of the party failing to file such brief or memorandum to the sustaining of said pleading or granting of said motion. Should the court desire oral argument on any pleading or motion submitted, the clerk will place the same on the law and motion calendar and notify respective parties or counsel accordingly.

Unless otherwise ordered by the court, or provided in these rules, every Monday shall be law and motion day, on which will be heard ex parte motions and all pleadings or motions raising questions of law or fact to be determined by the court before trial or after verdict. Parties filing motions on which hearings are to be had shall notice the same for hearing on a law and motion

> day and all motions noticed for hearing on any other day are hereby continued to the first law and motion day following the day fixed in the notice of hearing unless otherwise ordered by the court. Such motions or pleadings in cases filed in the Tucson or Globe Divisions of the court will be heard at Tucson; such motions or pleadings in cases filed in the Phoenix or Prescott Divisions of the court will be heard at Phoenix, provided, when court is in session at Globe or Prescott on law and motion day, such motions or pleadings in cases filed in the Globe or Prescott Divisions will be heard at Globe in cases filed in the Globe Division and will be heard at Prescott in cases filed in the Prescott Division; and provided further, when the convenience of the court or counsel may require, the Court may hear and determine any such motion or pleading at any of the four places designated for holding the terms of this court,

with the above authorities cited, the court below erred in denying the application to set aside order extending time to answer, and motion for default.

This same line of authorities was filed in a brief supporting the application for an order removing Cecil A. Edwards, Assistant Attorney General of the State of Arizona, as counsel for appellees, and the same facts apply that no brief was filed opposing same. And again we respectively submit in view of the authorities cited and Rule 9 of the Rules of Practice of the

United States District Court for the District of Arizona, supra, the court below erred in denying said application, and appellant respectfully submits that this Court should give appellant a judgment as prayed for in the original complaint, on the pleadings.

II

The second amended complaint was dismissed on the motion to dismiss by appellees, which was supported by only the following points and authorities (R. 27):

> POINTS AND AUTHORITIES IN SUPPORT OF FOREGOING MOTION.
>
> There is no allegation of facts which will show or tend to show a conspiracy within the purview of Title 18, Section 51, United States Code.
>
> There is not sufficient allegation to show or tend to show that plaintiff was entitled to be given an examination for a license to practice medicine. Rule 12 (b).

Yet appellant filed the following authorities in oppostion to appellees' motion to dismiss::

> Constitution of the United States of America, Revised and Annotated, 1938, published by the United States Government Printing Office, states at Page 767:

"The amendment does not define the specific privileges and immunities of citizens of the United States; and 'no attempt has been made by the courts comprehensively to define or enumerate the privileges and immunities which the Fourteenth Amendment thus protects.' However, in the Slaughter House Cases the Court suggested 'some which owe their existence to the Federal Government, its National character, its Constitution or its laws,' as follows: Right of access to the seat of Government, and to the seaports, subtreasuries, land offices, and courts of justice in the several States; right to demand protection of the Federal Government on the high seas or abroad; right of assembly and privilege of writ of habeas corpus (specifically guaranteed by the Constitution); right to use the navigable waters of the United States; rights secured by treaty.

Colgate v. Henry, 296 U. S. 404, 429 (1935).

16 Wall. 36, 79 (1873).

"In 1823 Justice Washington in Corfield v. Coryell gave a partial enumeration of the fundamental privileges and immunities of the citizens of all free governments, and hence of the several State of the Union. He listed: 'Protection by the Government—The enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the Government may prescribe for the good of the whole.' This definition was adapted

in substance in Paul v. Virginia, and Ward v. Maryland, and 'the argument is not labored which gives the same meaning to it (the expression "privileges and immunities") when used in the Fourteenth Amendment'."

4 Wash. (U. S.) 371 (1823).

8 Wall. 168, 180 (1869).

12 Wall. 418, 430 (1871).

Maxwell v. Dow, 176 U. S. 581, 591, 592 (1900).

In Colgate v. Harvey, 296 U. S. 430, the United States Supreem Court said:

"The right of a citizen of the United States to engage in business, to transact any lawful business, or to make a lawful loan of money in any State other than that in which the citizen resides is a privilege equally attributable to his National citizenship. A State law prohibiting the exercise of any of these rights in another State would, therefore, be invalid under the Fourteenth Amendment."

* * *

"Constitutional guaranty of citizens of freedom from abridgment of privileges and immunitie as citizens and forbidding taking of property

without due process guarantee, among other things, right to pursue any lawful business."

Ex Parte Martin, 74 S. W. 2d 1037, 75 S. W. 2d 1116.

"State cannot arbitrarily exclude citizens of United States from doing business within State."

Davidson v. Henry L. Dougherty & Co., 241 N. W. 700, 91 A.L.R. 1308.

See also Bruhl v. State, 13 S. W. 2d 93;

City of New Brunswick v. Zimmerman, 79 Fed. 2d 428.

Story on the Constitution, Fifth Edition, Volume 2, Page 697, says as follows:

"Par. 1950. It should be observed of the terms 'life,' 'liberty,' and 'property,' that they are representative terms, and are intended and must be understood to cover every right to which a member of the body politic is entitled under the law. The limbs are equally protected with the life; the right to the pursuit of happiness in any legitimate calling or occupation is as much guaranteed as the right to go at large and move about from place to place. The word 'liberty' here employed implies the opposite of all those things which, beside the depreviation of life and property, were forbidden by the Great Charter. In the charter

as confirmed by Henry III., no freeman was to be seized, or imprisoned, or deprived of his liberties or free customs, or outlawed or banished, or any ways destroyed, except by the law of the land. The rights thus guaranteed are something more than the mere privileges of locomotion; the guarantee is the negation of arbitrary power in every form which results in a deprivation of right. The word we employ to comprehend the whole is not, therefore, a mere shield to personal liberty, but to civil liberty, and to political liberty also so far as it has been conferred and is possessed. It would be absurd, for instance, to say that arbitrary arrests were forbidden, but that the freedom of speech, the freedom or religious worship, the right of self-defense against unlawful violence, the right freely to buy and sell as others may, or the right in the public schools, found no protection here; or that individuals might be selected out and by legislative act arbitrarily deprived of the benefit of exemption laws, pre-emption laws, or even of the elective franchise. The word, on the other hand, embraces all our liberties—personal, civil, and political. None of them are to be taken away, except in accordance with established principles; none can be forfeited, except upon the finding of legal cause, after due inquiry."

In a footnote Justice Story quotes Dr. Lieber as saying:

"We should no more think of defining liberty in our constitutions than people going to be married would stop to agree upon a definition of love." Civ. Lib. and Selt-Govt. It may not be inappropriate here to introduce a definition from Mr. Mill: 'This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our character; of doing as we like, subject to such consequences as may follow, without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual follows the liberty, within the same limits, of combination among individuals; freedom to unite for any purpose not involving harm to others; the persons combining being supposed to be of full age, and not forced or deceived. No

society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest." Mill on Liberty, Introd.

In addition, we cite Bromley v. State, 2 S. E. 2d 641, 651, wherein the court said:

"The right to make a living is among the greatest of human rights, and when lawfully pursued cannot be denied."

III

The defendants have claimed that this complaint does not state a cause of action, and we submit the following authorities in oppostion to such contention:

Simkins Federal Practice, Rules of Civil Procedure 1938, Third Edition, Page 32, Paragraph 21, states: :

"Jurisdiction of the District Court. The jurisdiction of the district court is outlined in Par. 24 of the Judicial Code was amended. This section contains twenty-eight subsections, and includes jurisdiction of suits under many special federal laws. These subsections may be briefly summarized as follows:

" x x x

"23. Suits against trusts, monopolies, and unlawful combinations;"

And Paragraph 22, on Page 35, states:

"Requisites of Jurisdiction as a Federal Court. Thus the original jurisdiction of the District Courts in suits of a civil nature at common law or in equity may be stated as follows:

"First: When the suit arises under the Constitution and laws of the United States, or treaties made, or which shall be made, under their authority, and the matter in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

" x x x "

* * *

"Par. 113. What Is a Federal Question. The

rule is that when it appears from the complaint, unaided by any anticipation or avoidance of defenses, that the right of relief depends upon the construction or application of the Constitution-tion or laws of the United States, and that such Federal claim is not merely colorable and is substantial, the court has jurisdiction.

"The Federal Question must be substantial in order to confer jurisdiction."

Simkins Federal Practice, Third Edition, Page 157, and Cases Cited.

Mosher v. Phoenix, 287 U. S. 29.

Levering & G. Vo. v. Morrin, 289 U. S. 103.
Malone v. Gardner, 62 Fed. 2d 15.

IV

The Act of the Legislature in giving absolute power to examining boards to pass upon the qualifications, as enacted in the legislation referred to, is in violation of that part of Section 1 of Article III of the Constitution of the United States reading as follows:

"The judicial power of the United States, shall be vested in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish."

In Marbury v. Madison, 1 Cr. 137, 170, (1803), it is held that where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, the individual has a right to resort to the laws of his Country for a remedy.

See also United States ex rel, Boynton v. Blaine, 139 U. S. 306, 326 (1891);

Ex Parte Cooper, 143 U. S. 472, 503 (1892);
Quackenbush v. United States, 177 U. S. 20, 25 (1900);

Clough v. Curtis, 134 U.S. 361, 372 (1890);

V

Paragraph VIII of the second amended complaint alleges as follows:

> "That all the defendants, except Charles C. Bradbury, are members of the Maricopa County Medical Association, and of the Medical Association of the State of Arizona, and of the American Medical Association, all of whom work in close cooperation and maintain the same standards, rules and requirements, through their legislative committees, in regard to the examining and licensing of applicants for the practice of medicine and surgery in Arizona; and that the Association of American Medical Colleges is sponsored and supported by the aforesaid American

Medical Association, but that both the American Medical Association and the Association of American Medical Colleges are monopolistic and in fact a trust and are engaged in interstate traffic and monopoly in violation of Section 2, Title 15 of the United States Laws, and in violation of Section 74-101 of the laws of Arizona, in force and effect; all contrary to and in violation of this plaintiff's rights and benefits concerning which the defendants, personally and individually, have conspired with the officers of the American Medical Association, the Medical Association of Arizona and the Maricopa County Medical Association, in denying this plaintiff a license and his rights to practice medicine and surgery in Arizona, notwithstanding the fact that he has been, and is qualified and entitled thereto, to their knowledge."

This cause alone is a sufficient cause of action.

The American Medical Association, of which the appellees, with the exception of Charles C. Bradbury, are members, was convicted for violation of the anti-trust laws in the District Court of the United States in and for the District of Columbia, which conviction was upheld by the United States Supreme Court, Advance Sheet No. 7, Vol. 87, U. S. L. Ed. 348.

The right to sue for damages for violation of the Sherman and Clayton anti-trust acts is fully discussed in Columbia Law Review, Volume 39, Pages 524 to 528. Among the cases cited therein upholding this

right is Majestic Theater Company, Inc. v. United Artists Corporation, 43 F. 2d 991; Paramount Famous Lasky Corporation v. United States, 34 F. 2d 984, Affirmed 282 U. S. 30.

Again, in Columbia Law Review, Volume 40, Page 1100, in discussing these cases it states:

> "If such an agreement is approved, the courts, mindful of the public interests in this industry, have repeatedly held it to be unreasonable and thus within the stricture of the anti-trust laws."

If the courts are mindful of the public interests in the moving picture industry, they should be more so in the American Medical Association and its members. And most assuredly when the American Medical Association, with its 123,000 members, who pay $30 each per year dues, maintain a legislative lobby to enact legislation providing that only graduates of the schools approved by their organization can qualify to take the examination and to be licensed to practice medicine and surgery, it must come within the stricture of the anti-trust laws.

VI

Counsel for appellees will contend that the Fourteenth Amendment to the Constitution does not apply, that this is a prohibition against the State; and that if it does, Cecil A. Edwards, as Assistant Attorney General of the State of Arizona, has the right to appear as counsel for appellees.

This the appellant denies, because the law which the appellees, through the American Medical Association, have obtained, providing that only graduates of the legally chartered schools of medicine, the requirements of which shall have been at the time of granting the diploma not less than those prescribed by the Association of American Medical Colleges, is unconstitutional.

What rights have the Association of American Medical Colleges to say that their method of treating the human ills is the only way? It is a well recognized fact that medicine is not an exact science. In a recent brief before the New Jersey Legislature opposing a similar law it was stated that in Johns-Hopkins Hospital their diagnoses were fifty per cent wrong, that in Bellview Hospital in New York their diagnoses were sixty per cent wrong, and similar facts regarding the greatest hospital institutions of the Country.

We for the last decade in our government have been drifting toward the crisis which we face today, of whether we shall have government by constituted authority or government by organization. The medical and legal professions have in the past been looked up to for guidance through any crisis. For us to seek special legislation in any way providing for governing our professions I fear has been a guide for some of the problems we face of organizations letting our Armed Forces down. Unless stopped by the courts by decreeing that the legislature only can set the standards of the professions, we face disaster. Jus-

tice Ross of the Arizona Supreme Court, in Buehman et al. v. Bechtel et al., supra, has pointed out to the courts the law that can save our Constitution in this issue, as follows:

> "Only the Legislature can creat the standard and provide reasonable limits of the power admitting and excluding persons from a business, trade or profession.'

The Court further said in that case that "Legislation tending to promote monopolies in private business is to be condemned."

At the time this decision was rendered, the North Carolina Supreme Court, in the case of State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366, had upheld a statute licensing photographers, which caused Frank Hanft, Professor of Law, and Gay Nathaniel Hamrick, student, of the University of North Carolina, to write a thesis and brief on licensing of the professions, and Chief Justice Ross of the Supreme Court of Arizona in writing the decision in Buehman et al. v. Bechtel et al., supra, made the following comments in regard to the delegation of power to set the standards of practice to other than the Legislature:

> " 'Statutes regulating trades and occupations by the delegation of governmental power to boards and commissions formed largely of the groups affected, intended primarily to control

the personnel of the business, have become so common as to affect progessively and importantly the social and economic life of the State. A large number of laws of that character may be listed which not only regulate but organize into autonomous corporations occupations ranging from the learned professions to the ordinary trades. U. N. C. Law Review, Vol. 17, p. 1.

" 'No independent administrative supervision is provided over these organizations. No report of their activities is made to any responsible branch of the government. No audit is made by the State, except where items may incidentally affect the State Treasury. These matters are left to internal control. The organizations are, so to speak, legislatively launched and put on their own.

" 'The stage of internal protest has been reached. In marginal cases controversies in the courts have arisen as to whether the organization has captured a sufficient quantum of public purpose to operate as an agency of the government, or whether the police power of the State, ostensibly exercised for a public purpose, is not really farmed out to a private group to be used in narrowing the field of competition, or in aid of exploitation by creating remunerative positions in administration. Roach v. Durham, 204 N. C. 587, 169 S. E. 149; State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366.

Without the aid of the statute these groups would be mere trade guilds, or voluntary business associations; with it they become State agencies, retaining, however, as far as possible, distinctive guild features. An exclusive self-governing status is achieved by the device of securing a majority membership on the administrative boards or commissions, and in aid of this the power of the State is heavily invoked by way of prosecution in the criminal courts of those who are unable to secure the approval of the Board and obtain license to engage in the occupation.

" 'It is this power of exclusion of fellow workers in the same field that gives to the subject its social significance, and invites our most serious consideration of the constitutional guaranties of personal liberty and individual right called to our attention'."

The North Carolina Law Review in commenting on the Lawrence case, cited above, further states:

"Many of these laws it is suspected are procured by men already in the field, in order to keep others out. We are moving rapidly in the direction of regimenting even the most ordinary callings under official control, when it is doubtful whether the legislators or the public desire such state of affairs. It is doubtful whether even the responsible pressure groups are in favor of a controlled economy, they merely want certain ad-

vantages to be gained for themselves by one particular control statute, but statutes added together make a large-scale trend. There is a lack of uniformity among these miscellaneous control statutes, all of which have the same objective. Licensing legislation has had its trial period; it has demonstrated its value in those professions where special competence is essential to such vital public interests as health; it is time either to accept it as good policy for ordinary occupations, also, or to reject it as such policy. If accepted, it is time to frame a standard licensing law, to be deviated from in the case of any particular occupation only when there is reason for the deviation."

CONCLUSION

Appellant respectfully submits that he is entitled to have an examination for a license to practice medicine; that the appellees have denied him his right and have conspired in violation of Section 2, Title 15, of the Laws of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States in denying him his rights and causing him damages; that appellant is entitled to judgment on the original complaint filed herein and the motion for default against appellees (R. (19).

If not entitled to judgment, appellant has certainly stated a cause of action in the second amended

complaint alleging damages for violation of the anti-trust laws, and is entitled to have the right to prove the facts set up in the second amended complaint filed herein.

Respectfully submitted,

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